Supreme Court, U.S.
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No. 93-1683

In The

# Supreme Court of the United States

October Term, 1993

V.M. WHEELER, III,

*Petitioner,*

v.

KIDDER, PEABODY & CO. INCORPORATED,

and

GENERAL ELECTRIC CO.,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether an arbitration provision in a Uniform Application For Securities Industry Registration or Transfer Form U-4 ("U-4 Form") that was signed by the petitioner violates petitioner's rights under the Seventh Amendment to the United States Constitution.

2. Whether a state court order compelling petitioner to arbitrate his claims against respondents, made after an evidentiary hearing on the validity and enforceability of an arbitration provision, collaterally estops or otherwise bars petitioner from relitigating these same issues in subsequent suits against respondents.

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## STATEMENT OF THE CASE

Respondents generally agree with the statement of the case provided by petitioner. However, certain statements by petitioner need to be corrected.

Petitioner is a former employee of Kidder, Peabody & Co. Incorporated ("Kidder"). Petitioner signed a U-4 Form in connection with his employment at Kidder. This suit is the third lawsuit that petitioner has filed against respondents challenging the enforceability of an arbitration provision in his U-4 Form.

The U-4 Form contains the following arbitration provision:

> I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

Item 10 of the U-4 Form states that petitioner was registered with the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange ("NYSE"), and the American Stock Exchange ("ASE") as a General Securities Representative. Each of these organizations has rules, constitutions, and by-laws that require petitioner's underlying dispute with respondents to be arbitrated. *See* NASD By-Laws and the NASD Code of Arbitration at Part I, Section 1 and Part II, Section 8(a); NYSE Constitution and the NYSE Arbitration Rules at Article XI, Section 1; ASE Constitution and the ASE Arbitration Rules at Article VIII, Section 1.

In contravention of this arbitration agreement and these exchange rules, petitioner filed three lawsuits

against various combinations of Kidder, General Electric Co. ("GE"), Kidder's parent corporation, and Nancy Quinn, his supervisor at Kidder. On September 17, 1991, petitioner filed a lawsuit in the 190th Judicial District Court of Harris County, Texas against Kidder and Quinn (the "First Lawsuit"). The First Lawsuit contained many of the same causes of action that were pleaded against respondents in this case. Quinn and Kidder filed an answer, subject to their motion to compel arbitration, based upon the same arbitration provision and exchange rules.

On January 31, 1991, the state court conducted a hearing on the defendants' motion to compel arbitration. Petitioner's attorneys were present and had an opportunity to present evidence and arguments on his claims about the validity and enforceability of the arbitration provision, including whether this provision was procured by fraud. At the conclusion of the hearing, the state court ruled that petitioner knowingly signed the arbitration agreement and ordered him to arbitrate all of his disputes against both Kidder and Quinn. The state court entered this order on its docket sheet. *See* Appendix A.

On February 6, 1992, petitioner filed a notice of nonsuit. In accordance with Tex. R. Civ. P. 162, which provides that a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief," the state court signed and entered a formal order on March 3, 1992 reflecting its earlier ruling on defendants' motion. The court's order provides in relevant part:

> Defendants' Motion to Compel Arbitration and to Stay Pending Arbitration is in all things

> GRANTED; and that plaintiff submit all his disputes, claims, and causes of action against defendants made the basis of this suit to arbitration pursuant to the terms of the signed arbitration agreement . . . signed by the plaintiff, and that further proceedings in this action be stayed pending the conclusion of the arbitration proceeding.

*See* Appendix B.

Despite the state court's orders, petitioner subsequently filed additional lawsuits against Kidder, Quinn, and GE based upon the same basic employment allegations he made in the First Lawsuit. Petitioner filed suit (the "Second Lawsuit") in state court against Quinn, asserting substantially the same allegations against her that were asserted in the First Lawsuit. The state court has recently dismissed the Second Lawsuit for want of prosecution.

Petitioner also filed another lawsuit (the "Third Lawsuit"), which is the one on appeal before this Court, against Kidder and GE. Many of the claims asserted against Kidder in the Third Lawsuit are the same as those that were presented in the First Lawsuit, and all arise out of petitioner's employment relationship with Kidder. Petitioner added GE as a party to this lawsuit in a blatant attempt to avoid both the arbitration agreement and the orders in the First Lawsuit. Plaintiff's only pled claim against GE is based factually on the arbitration agreement and legally upon RICO, and was the subject of GE's own Rule 9(b) motion.

Respondents subsequently filed a motion to compel arbitration and a motion to dismiss pursuant to Fed. R.

Civ. P. 9(b) and 11, which the district court granted on October 13, 1992.[1] The district court also sua sponte dismissed the case on collateral estoppel and other grounds:

> The poignant question, in the Court's view, is whether the plaintiff may circumvent the order of the state court by non-suit and refiling essentially the identical suit in state and federal court. In the Court's view, the plaintiff should not. As far as this Court is concerned, the spirit of the order entered in state court must be respected because the order was not arbitrarily entered. A full and fair hearing was granted and no complaint has been made here concerning the process. Because the issue of arbitration has been litigated, no useful purpose is served in permitting the plaintiff a second day in court. In this regard, *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985) [setting forth the elements of res judicata and collateral estoppel], is dispositive of this issue.
>
> For judicial economy and to preserve the integrity of the judicial process, the Court holds that this suit should be dismissed. *See Houston North Properties v. White*, 731 S.W.2d 719, 722 (Tex. App. – Houston [1st Dist.] 1987).

Order of Dismissal at D-3 of Petition for Writ of Certiorari (the "Petition").

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[1] The district court found GE's 9(b) motion, along with the other motions, "meritorious." Order of Dismissal, at D-1 of Petition. Petitioner did not appeal this part of the district court's decision. Accordingly, regardless of the Court's ruling on the Petition, the district court's dismissal of GE from the suit should be affirmed.

On appeal, the Fifth Circuit affirmed the district court's decision dismissing this case:

> The parties have already litigated the issue of arbitrability in state court. That court entered a valid order compelling arbitration. A federal court must give full faith and credit to state court orders; therefore, the district court did not err in dismissing [petitioner's] suit.

Opinion at B-7 of Petition.

## REASONS THE PETITION SHOULD BE DENIED

### I. Petitioner Failed to Raise in the Lower Court His Claim That His Seventh Amendment Rights Were Violated.

Petitioner claims that the arbitration provision at issue violated his "right to trial by jury under the Seventh Amendment to the United States Constitution." Petition at Question Presented No. 1. This question is the only constitutional issue raised by petitioner. Petitioner raised this issue for the first time on appeal in his Petition. He did not present this issue to the United States Court of Appeals for the Fifth Circuit.[2]

This Court should not ordinarily decide questions that were neither raised before nor considered by the

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[2] Petitioner did claim that he was entitled to a jury trial on the issue of whether the arbitration agreement was procured by fraud or was otherwise unenforceable. Petitioner never claimed to the Fifth Circuit that the arbitration agreement violated his Seventh Amendment rights, however.

court of appeals. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (the Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1969); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition, but "not raised in the Court of Appeals" is "not properly before us"). Petitioner has not offered any compelling justification or excuse for failing to present this issue to the Fifth Circuit, such as a recent and unforeseen change in the law. Petitioner was represented by counsel at all stages of the appeal except the filing of this Petition. Accordingly, the Court should deny the Petition on the grounds that his Seventh Amendment claim is not properly before the Court.

## II. Petitioner Failed to Raise Any Claims That Are Important or Special.

Petitioner has failed to raise any claims that are important or special to anyone other than the parties. Sup. Ct. R. 10.1. Petitioner does not claim in his Petition that the Fifth Circuit rendered a decision that conflicts with the decision of another federal court of appeals or a state court of last resort on these same issues. Sup. Ct. R. 10.1(a). Petitioner also does not claim that the Fifth Circuit departed from the accepted and usual course of judicial proceedings such that this Court's power of supervision is required. *Id.*

In fact, the Fifth Circuit decision affirming the district court's dismissal of petitioner's complaint against his former employer and enforcing the U-4 Form arbitration

provision comports with the decisions of this Court and other Federal circuit courts of appeal. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1657 (1991) (Form U-4 arbitration provision made claims under Age Discrimination in Employment Act by securities representative against employer arbitrable); *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1050-54 (2d Cir. 1989) (former employee's post-employment claims against brokerage house arbitrable because of U-4 Form); *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987) (arbitration provision in U-4 Form made "false light" claims by employee against brokerage firm arbitrable); *McGinnis v. E.F. Hutton & Co., Inc.*, 812 F.2d 1011, 1013 (6th Cir. 1987) (a contractual duty to arbitrate "extends to non-brokers who sign U-4 agreements"); *Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 879 (9th Cir. 1992) (U-4 Form arbitration provision made claims for violations of the Employee Polygraph Protection Act arbitrable); *Hurst v. Prudential Securities, Inc.*, 1994 U.S. App. LEXIS 6940 at ¶ 10 (9th Cir. 1994) ("Courts have repeatedly found the Form U-4 to constitute a valid and enforceable agreement to arbitrate.") *See also Kaplan v. First Options of Chicago, Inc.*, 1994 U.S. App. LEXIS 5975, at ¶ 46 (3d Cir. 1994) (listing additional opinions in which federal courts have enforced U-4 arbitration provisions similar to petitioner's agreement).

At best, petitioner claims that both the district court and the Fifth Circuit misapplied Texas common law in concluding that petitioner was collaterally estopped from relitigating the enforceability of an arbitration provision. Petition at 4-9. Respondent contends that the Fifth Circuit correctly applied Texas law in affirming the dismissal of

petitioner's complaint. However, even if it did not, "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Justice Harlan, *Manning the Dikes*, 13 Record of N.Y. Bar Ass'n., 541, 551 (1958). *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

Because no important or special issues have been raised in the petition, the Court should deny the writ.

## III. The District Court Did Not Violate Petitioner's Seventh Amendment Right to a Trial by Jury.

Petitioner was not denied his Seventh Amendment rights because these rights can be waived by signing a valid arbitration agreement. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993). The district court correctly found that in the First Lawsuit "[a] full and fair hearing was granted" on the validity of the arbitration provision and that "no complaint has been made here concerning the process." *See* Order of Dismissal at D-3 of Petition. Petitioner was represented by counsel during this hearing and was able to fully present his evidence. Petitioner does not dispute this finding in his Petition.

Moreover, in reviewing the district court's conclusions, the Court should not "indulge every reasonable presumption against waiver" of the right to a jury, as requested by Petitioner. Petition at 5. Quite the contrary,

the Federal Arbitration Act establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25. *See also Explo, Inc. v. Southern Natural Gas Co.*, 788 F.2d 1096, 1098 (5th Cir. 1986) ("doubts as to the availability of arbitration must be resolved in favor of arbitration" in light of the "strong federal policy favoring arbitration"). *Accord Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (Federal Arbitration Act "requires that we rigorously enforce agreements to arbitrate").

The Court should review an order enforcing a state order compelling arbitration for abuse of discretion. *Dillard*, 961 F.2d at 1161 (cited by Fifth Circuit, Opinion at B-3 of Petition[3]). Because the state court found after an evidentiary hearing that the arbitration provision was valid and enforceable and that petitioner's claims were arbitrable, the district court did not abuse its discretion by dismissing petitioner's complaint.

## IV. Petitioner Failed to Produce Sufficient Evidence to Require a Jury Trial on Arbitrability in Any Case.

Petitioner failed to produce sufficient evidence to require a jury trial on arbitrability. Petitioner "cannot obtain a jury trial merely by demanding one." *Dillard*, 961

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[3] Petitioner does not claim that the Fifth Circuit applied the wrong standard of review.

F.2d at 1154. Rather, the party "resisting arbitration bears 'the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act.' " *Id.* (quoting *Bhatia v. Johnston*, 818 F.2d 418, 422 (5th Cir. 1987)). At a minimum, petitioner "must produce at least some evidence to substantiate his factual allegations." *Id.*

In *Dillard*, 961 F.2d at 1154, the plaintiff also argued that he was entitled to a jury trial against his brokers, despite his having entered into an arbitration agreement. Like petitioner, the plaintiff in *Dillard* claimed that the arbitration provision was a contract of adhesion, violated the antitrust laws, and was unconscionable. *Id.* at 1154-55. Because the plaintiff, who was pro se, "failed to produce any evidence that the agreement to arbitrate was somehow unfair or oppressive," the appellate court affirmed the district court's dismissal of the plaintiff's claims. *Id.*

Despite being represented by counsel and already having had one trial on arbitrability, petitioner failed to produce *any* evidence to the district court supporting his claims that the arbitration provision is unenforceable, such as that Kidder and GE committed fraud in the " 'making' of the agreement to arbitrate." *Id.* at n.9 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967)).[4]

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[4] Wheeler did provide the district court with an affidavit in which he claimed that he was "not aware that the [U-4] form contains an arbitration agreement" and that he "signed the U-4 without reading it." The Fifth Circuit has rejected this argument as "contrary to the universally prevailing rule that . . . one who executes a written contract is bound by its terms." *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1272, 1278 (5th. Cir. 1980)

Petitioner has also not raised any new facts that were not presented or otherwise known at the time of the hearing in the First Lawsuit. Because he failed to produce evidence to substantiate his claims that the arbitration provision was unfair or oppressive, petitioner's complaint was correctly dismissed.

## V. The Fifth Circuit Did Not Err in Its Application of Texas Law.

Petitioner's claim that the Fifth Circuit erred in applying Texas law to this case is incorrect in several respects.

### A. The Fifth Circuit Correctly Decided That the Orders in the First Lawsuit Are Enforceable.

In its Order of Dismissal, the district court correctly found that the docket sheet in the First Lawsuit "reflects the order of the Court." Order of Dismissal at D-1 of Petition. The state court entered its original order on its docket sheet before petitioner took his nonsuit. *See* Appendix A. In the column of the docket sheet titled "General Order of Court," the state court found that there was a "hearing on discovery, dispute and arbitrability" and held "[c]ase ordered to arbitration." *Id.* The docket sheet order also describes the state court's subsequent March 3, 1992 order as being an "Order re 1/31/92 *Order*" (emphasis added). *Id.* The Fifth Circuit, after reviewing

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(finding no evidence requiring jury trial on arbitrability where one party claimed that it did not read confirmation slips containing arbitration provision).

these facts, agreed with the district court that "the docket entry reflected a valid order of the court made at the hearing." Opinion at B-5 of Petition.

Petitioner claims that the Fifth Circuit and the district court erred in reaching this conclusion because the "oral rendition of a judgment supported by a court's docket sheet is insufficient for purposes of establishing a judgment." Petition at 7. However, the state court did not make an oral rendition of a judgment, but rather made a written order in the docket sheet. An order that "is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made," is enforceable. *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976) (cited by Fifth Circuit, Opinion at B-5 of Petition). *Accord Cluck v. Cluck*, 699 S.W.2d 246, 250-51 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.) ("A judgment is 'rendered' as of the date on which the trial judge declares in open court his decision on the matters submitted to him for adjudication, and oral pronouncement by the court of its decision is sufficient for rendition of judgment.").

In any case, the second order made by the state court on March 3, 1992 is also a valid and enforceable order. *See* Appendix B. Petitioner claims that the March 3, 1992 order is unenforceable because petitioner's nonsuit was taken prior to the court's entry of that order. Petition at 8. However, Texas Rule of Civil Procedure 162 provides that a nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." Tex. R. Civ. P. 162 (Vernon 1994). A "claim for affirmative relief" includes more than just counterclaims. *See, e.g., Falls County v. Perkins & Cullum*, 798 S.W.2d 868,

871 (Tex. App. – Fort Worth 1990, no writ) (a request for attorney's fee in defendant's answer constitutes a claim for affirmative relief); *State v. Approximately $2,000,000 in United States Currency*, 822 S.W.2d 721, 726 (Tex. App. – Houston [1st Dist.] 1991, no writ) (claim in an original answer asserted claim for affirmative relief). Rather, a "claim for affirmative relief" is broadly defined as a defensive pleading seeking relief independent of plaintiff's claims. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990) (quoting *Weaver v. Jack*, 717 S.W.2d 654, 657 (Tex. App. – Waco 1986, writ ref'd n.r.e.).

Respondent's motion to compel arbitration met this standard by requesting a court order that plaintiff's claims against defendants be arbitrated and stayed pending arbitration. On its face, the docket sheet shows that the state court was aware that petitioner had nonsuited his claims before signing the second order. *See* Appendix A. The Fifth Circuit properly stated that it was not "convinced that the state court motion to compel arbitration was not properly regarded as a claim for affirmative relief," and therefore concluded that the March 3 order was valid and enforceable. Opinion at B-5 of Petition.

### B. The Fifth Circuit Correctly Concluded That Petitioner's Nonsuit Did Not Affect the Validity of the Court's Orders in the First Lawsuit.

The Fifth Circuit correctly held that petitioner's "attempted nonsuit [under Tex. R. Civ. P. 162] cannot abrogate the effect of the state court's order compelling arbitration." Opinion at B-5 of Petition. The nonsuit provision found in Rule 162 should not be applied to "effect

injustice" or to "defeat the justice and right of the case." *Brightwell v. Rabeck*, 430 S.W.2d 252, 257 (Tex. Civ. App. – Fort Worth 1968, writ ref'd n.r.e.) (discussing the purpose of the Texas Rules of Civil Procedure). For example, the Texas Supreme Court has held that "[w]hether a discovery sanction survives a nonsuit depends upon the nature of the sanction involved." *Aetna Casualty & Sur. Co. v. Specia*, 849 S.W.2d 805, 806 (Tex. 1993). In *Specia*, the Texas Supreme Court favorably cited cases holding that the failure to enforce certain sanction orders after a Rule 162 nonsuit would thwart the purpose of deterrence because the litigant "would lose all incentive to stop, think and investigate more carefully before serving and filing papers." *Id.* at 807 n.3 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 389 (1990)). As discussed above, a Rule 162 nonsuit also does "not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." Tex. R. Civ. P. 162. (Vernon 1994).

These limits on petitioner's right to nonsuit his claims must also be considered in light of the strong Texas and federal policies favoring arbitration. *Neal v. Hardee's Food Systems., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990); *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex. App. – Dallas 1987, writ ref'd n.r.e.). Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, mandates that the courts enforce arbitration on issues as to which an arbitration agreement exists:

> A written provision . . . to settle by arbitration a controversy thereafter arising out of such [agreement], or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable . . . .

The Federal Arbitration Act is binding, and a trial court has no discretion under the Act to refuse to compel arbitration pursuant to a valid arbitration agreement. *Price v. Drexel Burnham & Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986). As discussed above, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25.

The Fifth Circuit also properly considered petitioner's "right" to nonsuit a claim in which an arbitration order has been entered and file essentially the same suit in federal court in light of strong judicial principles of comity. Opinion at B-7 of Petition. Comity principles are flexible:

> Comity is a principle in which the courts of one state or jurisdiction will give effect to the laws or judicial decisions of another, not as a matter of obligation, but out of deference and respect. *Black's Law Dictionary* 242 (5th ed. 1979). To allow one court to intrude upon the orders of another is not in the interest of judicial economy and is inappropriate without concrete public policy concerns.

*Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex. App. – Houston [14th Dist.] 1992, no writ).

The Fifth Circuit's comity concerns about giving "full faith and credit to state court orders" are particularly strong in this case. As the district court observed, to allow petitioner to avoid an arbitration order in the First Lawsuit by taking a nonsuit would serve no useful purpose, threaten the integrity of the judicial process, run afoul of strong policies favoring arbitration, and be a

waste of judicial resources. Order of Dismissal at Petition D-1 to D-3. Indeed, during the scheduling conference, petitioner's lawyer conceded that the purpose of nonsuiting the First Lawsuit was to forum shop:

> The Court: If you go to court and get a result that you don't want, you cannot simply file another lawsuit just to keep doing it until you get what you want.
>
> Mr. Franklin: In the state of Texas, that's correct. But this was an interlocutory order and the order wasn't signed when it was nonsuited. And the cases are very clear. *They're absolutely clear that we have the right to do that.*

Transcript from Scheduling Conference at 7 (emphasis added).

In *Houston North Properties v. White*, 731 S.W.2d 719, 722 (Tex. App. – Houston [1st Dist.] 1987, writ dism'd), the court was faced with a similar situation when a party, among other things, "took a nonsuit . . . for the single purpose of seeking a more favorable forum." The court frowned on this tactic:

> This move to manipulate jurisdiction away from another district court is repugnant both to the rules of trial and appellate procedure, and to the spirit behind their enactment that dictates order and efficiency among courts with concurrent jurisdiction. This conduct is a threat to the independence and order of our judiciary. It must cease.

*Id. See also Lamar Savings Ass'n v. White*, 731 S.W.2d 715, 718 (Tex. App. – Houston [1st Dist.] 1987, no writ) (following the decision in *Houston North Properties*).

These fundamental principles of federal and Texas law favoring arbitration and the integrity of state court orders deserve the same protection from nonsuit abuse as do the sanction orders the Texas Supreme Court considered in *Specia*. The Fifth Circuit correctly applied these principles in concluding that "[t]he parties have already litigated the issue of arbitrability in state court," that the court in the First Lawsuit "entered a valid order compelling arbitration," that the "federal court must give full faith and credit to state court orders," and that "the district court did not err in dismissing [petitioner's] suit." Opinion at B-7 of Petition.

### C. The Fifth Circuit Correctly Applied Texas Collateral Estoppel Principles.

The Fifth Circuit also recognized that Texas law on collateral estoppel requires that "a party must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action, (2) those facts were essential to the judgment in the first case, and (3) the parties were cast as adversaries in the first action." Opinion at B-6 of Petition. *See also Jeanes v. Henderson*, 688 S.W.2d 100, 106 (Tex. 1985); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 362 (Tex. 1971); Restatement (Second) of Judgments § 27 (1982). Petitioner does not dispute in his Petition that the Fifth Circuit correctly set forth the elements of collateral estoppel in Texas.

The Fifth Circuit then applied these principles to the facts surrounding the procedural history of the First Lawsuit. The court found that the validity of the arbitration

provision "was fully litigated in state court," that "the validity of the arbitration agreement was obviously the only issue relevant to the motion to compel arbitration," and that "the parties were identical and, therefore, cast as adversaries." Opinion at B-6 of Petition. Petitioner also does not dispute any of these conclusions in his Petition. It follows that the Fifth Circuit was correct in concluding that the state court orders in the First Lawsuit "precluded [petitioner] from relitigating the issue of the validity of the arbitration agreement." Opinion at B-7 of Petition.

Petitioner claims that the state court orders in the First Lawsuit are not "final judgments," however, and that "under Texas state law, a final judgment is required to establish res judicata and, hence, collateral estoppel." Petition at 7.[5] The Fifth Circuit properly rejected this argument and correctly stated that " 'finality' does not require a final judgment, but only that the issue has been 'fully litigated.' " Opinion at B-4 of Petition. *See Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-91 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, *and*

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[5] In his Fifth Circuit brief, petitioner also claimed that the state court orders should not estop him in the federal case because he made new claims of fraud, illegality under the Sherman Act and RICO statute, waiver, and adhesion. However, the Fifth Circuit correctly found that "[c]ollateral estoppel precludes relitigation of issues, not claims" and that "new causes of action arising out of the same set of operative facts will also be precluded." Opinion at B-6 of Petition. *See Wilhite v. Adams*, 640 S.W.2d 875, 876 (Tex. 1982); *Benson*, 468 S.W.2d 361, 362 (Tex. 1971); Restatement (Second) of Judgments § 27 cmt. c (1982). Petitioner apparently concedes this point, since he has not complained in this Court about this part of the Fifth Circuit's opinion.

*cert. denied*, 460 U.S. 1013 (1983); Restatement (Second) of Judgments § 13 cmt. g (1982); *City of Bismarck v. Toltz, King, Duvall, Anderson & Assocs.*, 767 F.2d 429, 431 (8th Cir. 1985) ("[b]ecause the parties have had a full and fair opportunity to litigate the issue, the parties should not be allowed to relitigate" arbitrability because of collateral estoppel).

## CONCLUSION

The decision of the Fifth Circuit, which the petitioner asks this Court to review, comports with the applicable decisions of this Court and the lower federal courts and correctly applies Texas law. There is nothing "special" or "important" under Rule 10 for this Court to consider. The petition for writ of certiorari should be denied.

Respectfully submitted,

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91-47995

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Filed 9-17- 1991

Wheeler, V M III

PLAINTIFFS

Attorneys

NATURE OF ACTION

Breach of Contract

vs.

Lizzie Peabody & Co Incorporated

DEFENDANTS

Attorneys

SURETIES ON COST BOND

Jury Fee Paid By

SETTINGS

19 General Order of Court

1-31-92 Hearing re Discovery dispute & Arbitrability. Case ordered to arbitration & to submit appropriate order;

2-12-92 Notice of Removal

3-2-92 Order re 1-31-92 Order

BEST AVAILABLE COPY

## APPENDIX B

NO. 91-047995

| | | |
|---|---|---|
| V. M. WHEELER III,<br>Plaintiff,<br>v.<br>KIDDER, PEABODY & CO. INCORPORATED, AND NANCY K. QUINN,<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS<br>190TH JUDICIAL DISTRICT |

ORDER

On the 2nd day of March, 1992, came on for hearing Defendants' Motion to Compel Arbitration and to Stay Pending Arbitration and Defendants' Motion for Protective Order Quashing Plaintiff's Initial Discovery Requests. All parties appeared by and through their respective counsel. The Court, after considering the pleadings, affidavits, documents, and records filed by the parties, the relevant authorities, and the arguments of counsel, is of the opinion that Defendants' Motions are valid and should be GRANTED and it is, therefore,

ORDERED that Defendants' Motion to Compel Arbitration and to Stay Pending Arbitration is in all things GRANTED; and that plaintiff submit all his disputes, claims, and causes of action against defendants made the basis of this suit to arbitration pursuant to the terms of the signed arbitration agreement contained in the uniform Application for Securities Industry Registration or Transfer (Form U-4) signed by the plaintiff, and that

further proceedings in this action be stayed pending the conclusion of the arbitration proceeding and

IT IS FURTHER ORDERED that Defendants' Motion for Protective Order Quashing Plaintiff's Initial Discovery Requests is in all things GRANTED, and that Plaintiff's First Set of Interrogatories, Request for Production and Requests for Admission is hereby quashed.

Signed this 2nd day of March, 1992.

/s/ Eileen O'Neill
JUDGE PRESIDING

APPROVED AS TO FORM
AND SUBSTANCE:

BAKER & BOTTS

BY _____

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_____

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## APPENDIX C

*LIST NAMING ALL PARENT COMPANIES AND SUBSIDIARIES OF RESPONDENTS KIDDER, PEABODY & CO. INCORPORATED AND GENERAL ELECTRIC CO.*

1. *General Electric Company.*

   A. General Electric Co. does not have any parent corporations.

   B. The following companies are subsidiaries of General Electric Co.:

   General Electric Company
   G.E. Aircraft Engines
   Marine & Industrial Engines & Services Div.
   G.E. Appliances (A General Electric Co.)
   Roper Corporation
   RGE Corporation
   G.E. Capital Fleet Services (Operation of General Electric Corp.)
   G.E. Communications Services
   General Electric Information Systems Co.
   G.E. Electric Distribution & Control Manufacturing
   G.E. Industrial Power Systems
   G.E. Industrial & Power Systems Sales
   G.E. Nuclear Energy
   G.E. Power Delivery Division
   G.E.-Hitachi HVB, Inc.
   Bayou Cogeneration
   G.E. Lighting
   G.E. Toshiba Lighting Corporation
   G.E. Medical Systems
   G.E. Plastics
   G.E. Specialty Chemicals
   G.E. Plastics-America
   Plastics Manufacturing Div.
   Plastic Sales Div.

G.E. Silicones
G.E. Superabrasives
Silicone Products Div.
G.E. Trading Company
General Electric Supply Co. Div.
GE/Fanuc Automation North America
GE Transportation Systems
General Electric Financial Services, Inc.
Decimus Corp.
Employers Reinsurance Corp.
G.E. Capital Corporation
G.E. Capital Fleet Services
Building & Trailer Services
G.E. Capital McCullagh
Gelco Travel Services, Inc.
Creative Media
Gelco CTI Container Services, Inc.
Gelco Fleet Mngmt.
Gelco Fleet & Management Services Company
Gelco International Corp.
Gelco Space
TIP-Transport International Pool
G.E. Capital Vendor Financial Services
Eastman Kodak Credit Corporation
G.E. Capital Mortgage Services
General Electric Railcar Services Corp.
General Electric Railcar Repair Services Corp.
Kidder, Peabody Group Inc.
Polaris Aircraft Leasing Corporation
G.E. Environmental Systems
National Broadcasting Co., Inc.
CNBC
Patrick Media Group, Inc.
United Pacific Life Insurance Company

2. *Kidder, Peabody & Co. Incorporated*

   A. The parent company of Kidder, Peabody & Co. Incorporated is Kidder, Peabody Group Inc.

   B. Kidder, Peabody & Co. Incorporated does not own any subsidiaries that are not wholly-owned.

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